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No. 02-1672

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

RODERICK JACKSON, *Petitioner*,

v.

BIRMINGHAM BOARD OF EDUCATION, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMICI CURIAE NEW YORK LAWYERS FOR THE PUBLIC INTEREST, THE SOUTHERN POVERTY LAW CENTER, AND THE TRAINING AND ADVOCACY CENTER OF THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the private right of action for violations of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, encompasses redress for retaliation for complaints about unlawful sex discrimination.

TABLE OF CONTENTS

Page

Question Presented i

Interest Of Amici 1

Statement 3

Summary Of Argument 7

Argument 8

I. Because Title IX Itself Proscribes Retaliation, Retaliation Claims Are Cognizable In Private Actions 8

A. Federal Agencies Have Correctly Construed Title IX To Prohibit Retaliation 8

B. Title IX's Origins Demonstrate That Congress Intended To Proscribe Retaliation 12

C. *Sandoval* Confirms That There Is A Private Right Of Action To Challenge Statutory Violations 14

D. The Eleventh Circuit's Construction Undermines The Statute 16

II. Recognizing That Title IX Proscribes Retaliation Will Not Create Undue Litigation 18

A. The Prohibition On Retaliation Is Essential To Title IX But Infrequently Litigated 18

B. Invalidating The Agencies' Longstanding Construction Might Increase Litigation 20

III. The Court Should Not Immunize Funding Recipients That Purport To Retaliate Universally 23

A. Text, Logic, And Experience Demonstrate That Retaliation For Complaints About Sex Discrimination Is Discrimination On The Basis Of Sex 24

B. Any Effort To Accommodate The Imaginary Across-the-Board Retaliator Would Be Administratively Unsound 26

C. The Government's Hypothetical Exclusion For Across-The-Board Retaliation Is Contrary To Its Own Guidance And Law Enforcement Interests 28

Conclusion 29

TABLE OF AUTHORITIES

Cases:

Adarand Constructors, Inc. v. *Mineta*, 534 U.S. 103 (2001) 24

Alexander v. *Sandoval*, 532 U.S. 275 (2001) ..... *passim*

Amax Land Co. v. *Quarterman*, 181 F.3d 1356 (D.C. Cir. 1999) 16

Auer v. *Robbins*, 519 U.S. 452 (1997) 10

Barnhart v. *Thomas*, 124 S. Ct. 376 (2003) 29

Barnhart v. *Walton*, 535 U.S. 212 (2002) 13

Beasley v. *St. Tammany Parish Sch. Bd.*, No. Civ. A96-2333, 1997 WL 382056 (E.D. La. July 9, 1997) 19-20

Brentwood Academy v. *Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001) 21

Brooks v. *So. Univ.*, No. Civ. A. 99-1828, 1999 WL 627385 (E.D. La. Aug. 16, 1999) 19, 20

Burns v. *United States*, 501 U.S. 129 (1991) 16

C.R.K v. *U.S.D.*, 176 F. Supp. 2d 1145 (D. Kan. 2001) 21

Cannon v. *University of Chicago*, 441 U.S. 677 (1979) 5, 9, 13, 15

Cases—cont'd

Chevron U.S.A., Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 12, 16

City of Boerne v. *Flores*, 521 U.S. 507 (1997) 15

City of Columbus v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424 (2002) 16

Clay v. *Bd. of Trustees of Neosho County Cmty. Coll.*, No. Civ. A. 94-2282, 1996 WL 370176 (D. Kan. June 19, 1996) 21

Cubie v. *Bryan Career Coll.*, 244 F. Supp. 2d 1191 (D. Kan. 2003) 21

DeShaney v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989) 23-24

Doe v. *Eason*, No. Civ. A. 98-2454, 1999 WL 765645 (N.D. Tex. Sept. 23, 1999) 20

Doe v. *Granbury Indep. Sch. Dist.*, 19 F. Supp. 2d 667 (N.D. Tex. 1998) 19, 20

Dothard v. *Rawlinson*, 433 U.S. 321 (1977) 2

Evans v. *United States*, 504 U.S. 255 (1992) 13

Flot v. *Orleans Parish Sch. Bd.*, No. Civ. A. 96-3661, 1998 WL 915864 (E.D. La. Dec. 29, 1998) 19, 20

Franklin v. *Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992) 9

Frazier v. *Fairhaven School Committee*, 276 F.3d 52 (1st Cir. 2002) 20

Goins v. *Hitchcock Indep. Sch. Dist.*, 91 F. Supp. 2d 860 (S.D. Tex. 2002), aff'd, 2003 WL 1922939 (5th Cir. 2003) 20

Guardians Ass'n v. *Civil Service Comm'n of the City of New York*, 463 U.S. 582 (1983) 5-6

Holt v. *Lewis*, 955 F. Supp. 1385 (N.D. Ala. 1995) 5

Cases—cont'd

Hoyt v. *St. Mary's Rehab. Ctr.*, 711 F.2d 864 (8th Cir. 1983) 18

Laksham v. *Univ. of Maine Sys.*, No. CV-03-52-BW, 2004 WL 1770706 (D. Me. 2004) 20

Lipsett v. *University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988) 27

Lorillard v. *Pons*, 434 U.S. 575 (1978) 13

Lowery v. *Texas A&M University System*, 117 F.3d 242 (5th Cir. 1997) 5, 19

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) 26-27

Morse v. *Regents of the Univ. of Colo.*, 154 F. 3d 1124 (10th Cir. 1998) 21

O'Connor v. *Peru State Coll.*, 781 F.2d 632 (8th Cir. 1986) 27

Peters v. *Jenney*, 327 F.3d 307 (4th Cir. 2003) 12, 19

Preston v. *Commonwealth of Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203 (4th Cir. 1994) 27

Raggs v. *Mississippi Power & Light Co.*, 278 F.3d 463 (5th Cir. 2002) 27

Reeves v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) 27

Regents of the Univ. of California v. *Bakke*, 438 U.S. 265 (1978) 6

Roberts v. *Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir.), cert. denied, 510 U.S. 1004 (1993) 27

St. Mary's Honor Ctr. v. *Hicks*, 509 U.S. 502 (1993) 27

State of Ill. Dep't of Public Aid v. *Schweiker*, 707 F.2d 273 (7th Cir. 1983) 16

Cases—cont'd

Sullivan v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969) 13

Texas Dep't of Cmty. Affairs v. *Burdine*, 450 U.S. 248 (1981) 27

Texas Rural Legal Aid, Inc. v. *Legal Servs. Corp.*, 940 F.2d 685 (D.C. Cir. 1991) 16

Weber v. *Cranston Sch. Comm.*, 212 F.3d 41 (1st Cir. 2000) 17-18

Whetsel v. *Network Prop. Servs., LLC*, 246 F.3d 897 (7th Cir. 2001) 16

Willner v. *Budig*, 848 F.2d 1032 (10th Cir. 1988), cert. denied, 488 U.S. 1031 (1989) 20

Yee v. *City of Escondido*, 503 U.S. 519 (1992) 23

Yusuf v. *Vassar College*, 35 F.3d 709 (2d Cir. 1994) 27

Statutes:

Education Amendments Act of 1972, Title IX,
20 U.S.C. § 1681 *et seq.* ..... *passim*
20 U.S.C. 1681(a) ..... *passim*
20 U.S.C. § 1682 ..... 6, 15

Rehabilitation Act of 1973, as amended,
29 U.S.C. § 791 *et seq.* 1, 17
29 U.S.C. § 794(d) 17

38 U.S.C. § 516(d) 10

42 U.S.C. § 1982 13

42 U.S.C. § 1983 ..... 19, 21, 22

Civil Rights Act of 1964, Title VI,
42 U.S.C. § 2000d *et seq.* ..... *passim*

42 U.S.C. § 12203 17

Regulations and Regulatory Materials:

34 C.F.R. § 100.7(e) 3, 9
34 C.F.R. § 100.8(d) 22
34 C.F.R. § 106.71 3
34 C.F.R. § 106.8 22
45 C.F.R. § 80.7(e) (1971) 22
29 Fed. Reg. 16,274 (1964) 4
29 Fed. Reg. 16,298 (1964) 13
62 Fed. Reg. 12,034 (1997) 4, 10
65 Fed. Reg. 66,092 (2000) 4, 10, 23, 29
U.S. Dep't of Justice, *Title IX Legal Manual* (Jan. 11, 2001) 4, 9, 17, 28, 29
Dep't of Education, *Office of Civil Rights Case Resolution And Investigation Manual* 22

Miscellaneous:

Michael J. Klarman, *From Jim Crow to Civil Rights* 352 (2004) 11
119 Cong. Rec. S13919 (July 18, 1973) 17

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BRIEF OF AMICI CURIAE
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INTEREST OF AMICI CURIAE

New York Lawyers for the Public Interest (NYLPI) is a non-profit law firm formed in 1976 to address the unmet legal needs of New Yorkers. In partnership with member law firms, corporate law departments, and other organizations, NYLPI defends the civil rights of New Yorkers in areas such as disability rights, environmental justice, and access to health care. NYLPI has appeared as counsel of record or as *amicus curiae* in numerous cases involving the civil rights guarantees provided by the Rehabilitation Act of 1973, 29

U.S.C. § 791 *et seq.*, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*

Founded in 1971 and located in Montgomery, Alabama, the Southern Poverty Law Center has litigated numerous civil rights cases on behalf of women, minorities, and other victims of discrimination. Its cases before this Court include *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), and *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977). The Center's work is focused on the Deep South, and it often litigates in the Eleventh Circuit.

The Training and Advocacy Center of the National Association of Protection and Advocacy Systems (TAC/NAPAS) provides training and technical assistance to the nationwide network of protection and advocacy agencies. Located in all 50 States, the District of Columbia, Puerto Rico, and the federal territories, protection and advocacy agencies must, under various federal statutes, provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings. The protection and advocacy system is the Nation's largest provider of legally based advocacy services for persons with disabilities. TAC/NAPAS is interested in this case because it involves the enforcement of civil rights laws.

This case concerns whether there is a private right of action to redress retaliation against those who identify, testify about, or complain of violations of Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 *et seq.* The availability of a private right of action is essential to the efficacy of Title IX, the Rehabilitation Act, and Title VI, in protecting *amici*'s clients from unlawful discrimination and allowing them to enforce fundamental antidiscrimination guarantees without fear of retribution.[1]

[1] The parties have filed letters with the Clerk of the Court consenting to the filing of *amicus* briefs in accordance with Rule 37.3(a). Pursuant to this Court's Rule 37.6, the *amici* submitting this brief and their counsel hereby represent that neither party to this case nor their counsel authored this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation and submission of this brief.

STATEMENT

1. Congress enacted Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, to combat sex discrimination in federally funded education programs and activities. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

The Department of Education and the Department of Justice have issued regulations implementing Title IX. Those regulations state that Title IX's prohibitions extend to efforts to retaliate against individuals who identify, complain of, or challenge practices they believe to be discriminatory. Entitled "intimidatory or retaliatory acts prohibited," the regulations provide:

> No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by * * * the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part.

34 C.F.R. § 100.7(e) (incorporated by 34 C.F.R. § 106.71).

The Department of Education and the Department of Justice also have explained that the prohibition on retaliation originates in Title IX itself (rather than being a prophylactic regulatory prohibition). U.S. Dep't of Justice, *Title IX Legal Manual* 70 (Jan. 11, 2001) ("[A] recipient's retaliation against a person who has filed a complaint * * * violates Title IX."); Dep't of Education, *Sexual Harassment Guidelines*, 62 Fed.

Reg. 12,034, 12,044 (1997) ("[R]etaliation is prohibited by Title IX."); Dep't of Education, *Proposed Revised Sexual Harassment Guidelines*, 65 Fed. Reg. 66,092, 66,106 (Nov. 2, 2000) (same).

Title IX was modeled after Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* Title VI is part of a comprehensive effort to combat racial discrimination in federally funded programs. Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d-1. When Congress enacted Title IX in 1972, federal regulations implementing Title VI expressly proscribed retaliation for asserting Title VI rights or otherwise participating in proceedings or investigations under Title VI. See, *e.g.*, 29 Fed. Reg. 16,274, 16,277 (1964) (Dep't of Agriculture) (codified as 7 C.F.R. § 15.7).

2. In 1993, respondent Birmingham Board of Education hired petitioner Roderick Jackson to teach physical education and to coach girls' basketball. Jackson eventually concluded that the Ensley High School girls' basketball team was being denied equal funding and equal access to athletic equipment and facilities; he protested that unequal treatment to his supervisors. Shortly thereafter, Jackson started receiving negative work evaluations. In May of 2001, he was relieved of his paid coaching duties. Jackson, however, remained employed as a physical education teacher. Pet. App. 3a.

In July of 2001, Jackson filed suit against respondent in the United States District Court for the Northern District of Alabama, alleging (among other things) that respondent had violated Title IX. The complaint alleged that respondent had retaliated against Jackson, removing him from his coaching position because he had complained about the discriminatory treatment of the girls' basketball team. Pet. App. 3a.

The magistrate judge recommended that the complaint be dismissed. Pet. App. 28a-33a. The magistrate stated that there was a "persuasive" argument for recognizing retaliation claims under Title IX, relying on the Fifth Circuit's decision in *Lowery* v. *Texas A&M University System*, 117 F.3d 242 (5th Cir. 1997). See Pet. App. 31a. Nonetheless, the magistrate felt obligated to dismiss the case because the district court had rejected retaliation claims under Title IX in *Holt* v. *Lewis*, 955 F. Supp. 1385 (N.D. Ala. 1995), a decision that was summarily affirmed by the Eleventh Circuit, 109 F.3d 771 (1997) (Table), cert. denied, 522 U.S. 817 (1997). See Pet. App. 31a-32a.

The district court adopted the recommendation of the magistrate judge, stating that its earlier decision in *Holt* v. *Lewis* was "persuasive." Pet. App. 27a. In "the absence of controlling Eleventh Circuit or Supreme Court authority holding that Title IX expressly or implicitly creates a private cause of action for retaliation," the court stated, it would adhere to its view that "Title IX does not create such a right." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-26a. The court of appeals assumed for purposes of argument that respondent had "retaliated against Jackson for complaining about perceived Title IX violations." *Id.* at 3a. But the court held that such retaliation is not actionable under a private right of action, citing *Alexander* v. *Sandoval*, 532 U.S. 275 (2001). Pet. App. 8a.

In *Sandoval*, this Court addressed whether "disparate impact" claims could be asserted through the private right of action provided by Title VI. The Court agreed that, under *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), violations of Title VI could be asserted through a private right of action. However, citing *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), and *Guardians Association* v. *Civil Service Commission of the City of New*

York, 463 U.S. 582 (1983), the Court observed that "it is beyond dispute—and no party disagrees—that" Title VI itself "prohibits only intentional discrimination" and does not proscribe disparate impacts. 532 U.S. at 280 (discussing Section 601); see *id.* at 281-283 (discussing Section 602). Because Title VI did not itself proscribe disparate impacts, the Court held, disparate impact claims cannot be asserted under Title VI's implied private right of action. *Id.* at 285-286.

The Court also rejected the argument that agency regulations prohibiting disparate impacts can give rise to a private right of action where the statute itself does not. 532 U.S. at 291. Even though regulations might validly proscribe conduct the statute does not reach, the Court concluded that such regulations cannot "conjure up a private cause of action that has not been authorized by Congress." *Ibid.* "Agencies may play the sorcerer's apprentice" by construing the statute Congress has entrusted to them for administration. They cannot, however, "play the sorcerer himself" by creating both a right and a private cause of action to enforce it that Congress has withheld. *Ibid.*

Relying on *Sandoval*, the court of appeals in this case declared that "legislative intent is the *only* basis upon which a private right of action may be inferred." Pet. App. 11a. Looking to the text of Section 901 of Title IX, 20 U.S.C. § 1681(a), the court found no indication that Congress intended a prohibition on retaliation to be enforceable through a private right of action. Section 901, the court stated, was textually silent about retaliation. Pet. App. 19a-20a. The court also found no basis for inferring a private right of action to challenge retaliation under Section 902, 20 U.S.C. § 1682. Although that provision establishes federal enforcement of Title IX, the court of appeals held that it does not include "rights-creating language" with respect to "gender discrimination, retaliation, or any other kind of harm." *Id.* at 21a.

The court of appeals also held that, "even if Title IX did aim to prevent and remedy retaliation for complaining about gender discrimination," Jackson "is not within the class meant to be protected by Title IX." Pet. App. 23a. According to the court of appeals, an individual complaining about gender discrimination in violation of Title IX is protected only if he or she is the victim of the underlying discrimination. *Id.* at 23a-24a. Consequently, anyone subjected to retaliation for having identified discrimination directed at others—or who suffers intimidation or retaliation for testifying in proceedings about discrimination directed against others—is not protected by the statute. *Ibid.*

SUMMARY OF ARGUMENT

I. Notwithstanding the court of appeals' astigmatic analysis, the issue in this case—whether there is a private right of action to challenge retaliation under Title IX—turns on a relatively straightforward question: Does Title IX, as authoritatively interpreted by the agencies entrusted with its administration, proscribe such retaliation? The answer is "yes." The legislative and historical background against which Title IX was enacted show that Congress intended the statute to proscribe retaliation; two federal agencies tasked with implementing Title IX have so construed it; and common sense dictates that the statutory protection against discrimination would be illusory if violators were free to punish the act of reporting it. Although the court of appeals relied heavily on *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), to reach the opposite conclusion, that case supports the rule that the agencies' determination—that Title IX itself proscribes retaliation—must be afforded deference. And *Sandoval* makes it clear that, when Congress both intends a statute to be privately enforceable and entrusts the statute to an agency for administration, it likewise intends the agency's authoritative construction of the statute to be privately enforceable.

II. Nor should this Court be concerned that acknowledging Title IX's ban against retaliation would leave federal courts awash in new claims. The available evidence suggests that, notwithstanding the importance of the prohibition on retaliation, its private enforcement does not unduly contribute to the volume of litigation. At the same time, the threat of private enforcement deters retaliation and encourages the adoption of procedures and policies that prevent retaliation and retaliation claims alike.

III. Finally, this Court should decline to engage the United States' misguided suggestion, made in its *amicus* brief at the petition stage, that *universal* retaliation somehow cures discrimination prohibited by Title IX and other federal antidiscrimination statutes. This case does not present any question concerning the hypothetical across-the-board retaliator. The government's resolution of that hypothetical, moreover, is unsupported by text, logic, or experience. It contradicts the government's position as set forth in its guidelines and manuals. Its adoption would threaten the government's law enforcement interests. And it would needlessly undermine the cause of sound judicial administration, displacing well-established rules and procedures with a metaphysical inquiry that defies concrete application.

ARGUMENT

I. Because Title IX Itself Proscribes Retaliation, Retaliation Claims Are Cognizable In Private Actions

A. Federal Agencies Have Correctly Construed Title IX To Prohibit Retaliation

It is by now "beyond dispute" that, just as private individuals "may sue to enforce Title VI" of the Civil Rights Act of 1964, they may sue to enforce the substantive guarantees of Title IX of the Education Amendments Act of 1972 (Title IX), 86 Stat. 373, as amended, 20 U.S.C. 1681 *et seq.* See *Alexander* v. *Sandoval*, 532 U.S. 275, 280 (2001). In *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), this Court

held that private individuals may sue to enforce Title IX under an implied private right of action. Seven years later, Congress "ratified *Cannon*'s holding." *Sandoval*, 532 U.S. at 280; see *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 72 (1992) (Section 1003 of the Rehabilitation Act Amendments of 1986, 100 Stat. 1845, 42 U.S.C. § 2000d-7, "cannot be read except as a validation of *Cannon*'s holding."). Consequently, the only question in this case is whether Title IX proscribes the conduct identified in Jackson's complaint—retaliation for having identified or protested sex-based discrimination alleged to violate Title IX.

1. By its terms, Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). For decades, the federal agencies responsible for implementing that prohibition—including the Department of Justice and the Department of Education—have read it to encompass retaliation for having identified or complained of sex-based discrimination. Their regulations provide that no recipient of federal funding or any other person shall "intimidate, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by * * * the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part." 34 C.F.R. §§ 100.7(e), 106.71.

Significantly, those agencies have made it clear that Title IX *itself* prohibits retaliation; the prohibition on retaliation thus is a construction of the statute itself, not a regulatory prophylaxis that extends beyond the statutory mandate. The Department of Justice's *Title IX Legal Manual* (Jan. 11, 2001), for example, explains that "a recipient's retaliation against a person who has filed a complaint * * * *violates Title IX*." *Title IX Legal Manual* at 70 (emphasis added). The

Department of Education's *Sexual Harassment Guidelines* likewise provide that "retaliation is prohibited *by Title IX*." 62 Fed. Reg. 12,034, 12,044 (1997) (emphasis added); Dep't of Education, *Proposed Revised Sexual Harassment Guidelines*, 65 Fed. Reg. 66,092, 66,106 (2000) (same).[2]

2. The unexceptional conclusion that Title IX's prohibition on discrimination on the basis of sex encompasses retaliation for having identified or complained of sex discrimination is wholly consistent with Congress's evident understanding of the term "discrimination." For example, Section 516(d) of Title 38 of the United States Code authorizes disciplinary measures for employees "who engage in unlawful *employment discrimination, including retaliation* against an employee for asserting rights under an equal employment opportunity law." 38 U.S.C. § 516(d) (emphasis added). By barring "discrimination, including retaliation"—not "discrimination *and* retaliation"—Congress made clear in Section 516(d) that the term "discrimination" can "includ[e] retaliation * * * for asserting rights."

That construction, moreover, is reasonable (and the Eleventh Circuit's contrary view is not). The right to be free from discrimination means nothing if the likely consequence of asserting that right is punishment and retaliation rather than remediation. As the Department of Justice—the Nation's primary law enforcement agency—has observed:

> A right cannot exist absent some credible and effective mechanism for its enforcement and enforcement cannot occur in the absence of a beneficiary class willing and able to assert the right.

---

[2] To the extent the agencies' regulations are ambiguous with respect to the source of the retaliation prohibition, the agencies' clarifications in manuals and other sources are "controlling unless plainly erroneous or inconsistent with the regulation." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks omitted).

Title IX Legal Manual at 70.. That observation applies with particular force to statutes prohibiting discrimination. Discrimination by its nature targets the underrepresented, marginalized, and disenfranchised. Such individuals cannot invoke their right to be free from discrimination if those infringing their rights may intimidate and punish to prevent the rights from being asserted.

This Nation's history with racial discrimination provides ample proof of that. When Congress enacted Title VI of the Civil Rights Act of 1964 to combat racial discrimination in federally funded programs, the Nation's history already was regrettably replete with instances of intimidation and retaliation directed against those who opposed discrimination. See Michael J. Klarman, *From Jim Crow to Civil Rights* 352 (2004) (reporting that the NAACP lawyers who brought desegregation cases had their homes bombed, and that "Mississippi blacks were also aware that 'the KKK tries your case long before it can get to the Supreme Court'"); *id.* at 353 (reporting that the organizer of "the original school desegregation suit in Clarendon County * * * was fired from his job as a public school teacher"); *ibid.* ("[T]hreats to close desegregated schools and to fire black teachers apparently deterred the NAACP from pressing the Clarendon County case" in North Carolina.); *id.* at 157 ("White witnesses who challenged Jim Crow norms were subject to intimidation."). Congress must have been aware of that history of retaliation both when enacting Title VI to combat race discrimination in 1964, and when modeling Title IX's bar on sex-discrimination in federally funded education programs after Title VI in 1972. Indeed, before enacting Title IX in 1972, Congress heard extensive testimony about retaliation against students and employees who protested sex discrimination in educational contexts. Pet. 17-18.

That history, moreover, demonstrates that the use of intimidation and retaliation to silence those who oppose discrimination is part of discrimination and critical to its per-

petuation. As the Fourth Circuit has observed, "[r]etaliation of this sort bears such a symbiotic and inseparable relationship to intentional * * * discrimination that an agency could reasonably conclude that Congress meant to prohibit both, and to provide a remedy for victims of either." *Peters* v. *Jenney*, 327 F.3d 307, 318 (4th Cir. 2003). In sum, discrimination and retaliation are one and the same, and Congress surely understood that when it enacted Title VI in 1964 and Title IX in 1972.

3. The longstanding view that Title IX's prohibition on sex-based discrimination encompasses retaliation for having complained of such discrimination is therefore reasonable and entitled to deference under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). That authoritative construction, moreover, resolves whether a private cause of action is available for retaliation claims. As this Court explained in *Sandoval*, when Congress intends a statute "to be enforced through a private right of action," it "intends the authoritative interpretation of the statute to be so enforced as well." *Sandoval*, 532 U.S. at 284.

B. Title IX's Origins Demonstrate That Congress Intended To Proscribe Retaliation

To the extent any doubt could remain, it is eliminated by the background against which Title IX was enacted. As this Court has observed, *Sandoval*, 532 U.S. at 280, Congress borrowed much of Title IX's text and structure from the already-established prohibition on race discrimination in Title VI of the Civil Rights Act of 1964. Title VI declares that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 42 U.S.C. § 2000d-1. Immediately after Title VI was enacted, federal agencies adopted regulations expressly proscribing retaliation against individuals who asserted rights or

participated in proceedings or investigations under Title VI. See, *e.g.*, 29 Fed. Reg. 16,298, 16,301 (1964) (Dep't of Health, Education, and Welfare) (codified as 45 C.F.R. § 80.7(e) (1965); 45 C.F.R. § 80.7(e) (1971); 29 Fed. Reg. 16,274, 16,277 (1964) (Dep't of Agriculture) (codified as 7 C.F.R. § 15.7).

It is well established that, when "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978); cf. *Barnhart* v. *Walton*, 535 U.S. 212, 220 (2002) (re-enactment of "relevant provisions without change" is "further evidence * * * that Congress intended the Agency's interpretation, or at least understood the interpretation as statutorily permissible"); *Evans* v. *United States*, 504 U.S. 255, 260 n. 3 (1992) ("'[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.'") (quoting Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)).

That canon of construction has particular force here. Title IX's drafters "patterned" Title IX after Title VI, *Sandoval*, 532 U.S. at 280, and expressed their expectation "that it would be interpreted and applied as Title VI had been," *Cannon*, 441 U.S. at 696. Moreover, just three years before Congress enacted Title IX, this Court construed 42 U.S.C. § 1982's prohibition on racial discrimination in the sale and rental of property to bar retaliation against those who complain about such discrimination. *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969).

Thus, at the time Congress was enacting the anti-discrimination provision of Title IX, this Court and federal agencies alike were declaring that the prohibition on "discrimination" encompasses retaliation against those who

identify or complain of discrimination. Given that background, Congress certainly contemplated that Title IX's prohibition on sex discrimination in federally funded programs would encompass retaliation against those who assert the statute's protections.

C. *Sandoval* Confirms That There Is A Private Right Of Action To Challenge Statutory Violations

Although there is no dispute that a private right of action is available to enforce the prohibitions of Title IX, see pp. 8-9, *supra*, the decision below relied on *Alexander* v. *Sandoval*, *supra*, to conclude that retaliation claims are not privately enforceable. *Sandoval*, however, concerned whether there was a private right of action to challenge conduct that, under this Court's rulings, *did not violate the statute at issue, even as construed by the implementing agencies*. Here, in contrast, the question is whether there is a private right of action to challenge conduct (retaliation) that *violates* the statute.

In *Sandoval*, the plaintiff sought to assert a private right of action to challenge practices that had a disparate racial impact without proof of intent. This Court, however, already had held that Title VI itself "prohibits only intentional discrimination," a position with which "no party" in *Sandoval* "disagree[d]." 532 U.S. at 280; see *id.* at 286 n.6. Foreclosed from asserting a disparate impact claim under Title VI itself, the plaintiff in *Sandoval* sought to assert a private claim in court under agency regulations prohibiting activities with disparate impacts. 532 U.S. at 278.

The Court assumed the validity of the regulatory prohibition on disparate impacts, *Sandoval*, 532 U.S. at 281, and properly so: As in other contexts, Congress's decision to delegate to federal agencies express authority "to effectuate the provisions" of Title VI, 20 U.S.C. § 1682, encompasses authority to issue rules that sweep somewhat more broadly than the statute itself. Cf. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (recognizing that Congress, in exercising its

power to "enforce" the Fourteenth Amendment "by appropriate legislation," may enact laws to prevent violations by proscribing conduct that the Amendment itself would not prohibit). In *Sandoval*, however, the Court declined to hold that such purely regulatory or otherwise prophylactic prohibitions may be enforced through an implied private right of action. *Cannon* and Congress's amendments ratifying *Cannon* made it clear that *statutory* violations could be redressed through a private right of action. But the Court found no evidence "anywhere" in the statutory "text that Congress intended to create a private right to enforce *regulations*" barring conduct that Title VI permits. 532 U.S. at 291 (emphasis added); see *id.* at 292 (Congress's ratification of *Cannon* through Section 1003 of the Rehabilitation Act Amendments did not encompass regulatory claims, because the amendment "by its terms applies only to suits 'for violation of a *statute*,'" and "therefore does not speak to suits for violations of regulations that go beyond the statutory proscription.").

Here, in contrast, the federal agencies construing Title IX have not purported to establish a rule that goes beyond the statutory proscription. Instead, those agencies have construed Title IX *itself* as barring retaliation. See pp. 9-10, *supra*. *Sandoval* recognizes that such an agency interpretation, if valid, "authoritatively construe[s] the statute itself," making it "meaningless to talk about a separate cause of action to enforce the regulations apart from the statute." 532 U.S. at 284. Instead, where Congress "intends the statute to be enforced through a private right of action," it "intends the authoritative interpretation of the statute to be so enforced as well." *Ibid.* (citing cases). Since Congress unquestionably intended Title IX "to be enforced through a private right of action," it likewise intended the responsible agencies'

decades-old "authoritative interpretation"—that Title IX prohibits retaliation—"to be so enforced as well."[3]

D. The Eleventh Circuit's Construction Undermines The Statute

The Eleventh Circuit's construction, moreover, would leave large and inexplicable gaps in Title IX and an array of other antidiscrimination laws. As explained above, the proscription on retaliation is indispensable to the efficacy of Title IX. Absent a credible enforcement mechanism and witnesses

[3] The Eleventh Circuit also relied on the fact that Title VII of the Civil Rights Act expressly proscribes retaliation in the employment context, while Title IX (like Title VI) does not explicitly mention retaliation. Even if one sets aside the obvious structural differences between those provisions, see Pet. 14; *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 435-436 (2002) (explaining that the presumption "that the presence of a phrase in one provision and its absence in another reveals Congress' design * * * grows weaker with each difference in the formulation of the provisions under inspection"), that at most shows that Congress *required* retaliation to be barred under Title VII, but left open for agency interpretation whether the discrimination prohibited by Title IX includes retaliation. Particularly where Congress expects an administrative agency to fill statutory gaps, "[n]ot every silence is pregnant"; silence may just signal Congress's "expectation that nothing more need be said in order to" permit the agency to adopt a construction that "effectuate[s] [the] legislative objective." *Burns* v. *United States*, 501 U.S. 129, 136 (1991) (quoting *State of Ill. Dep't of Public Aid* v. *Schweiker*, 707 F.2d 273, 277 (7th Cir. 1983)). Consequently, the courts of appeals have recognized that the canon of *expressio unius est exclusio alterius* is not appropriate in cases (such as this one) that involve an administrative agency's construction of a statute. *Texas Rural Legal Aid, Inc.* v. *Legal Servs. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991) ("Whatever its usefulness in other circumstances * * * th[e] canon has little force in the administrative setting."); *Whetsel* v. *Network Prop. Servs., LLC*, 246 F.3d 897, 902 (7th Cir. 2001) (similar). That makes sense: An agency's interpretation must be given deference unless Congress has "directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. Silence generally does not "speak directly" to a matter. *Texas Rural Legal Aid*, 940 F.2d at 694; *Amax Land Co.* v. *Quarterman*, 181 F.3d 1356, 1365 (D.C. Cir. 1999).

who are able to provide evidence, Title IX's prohibition on discrimination means nothing. See pp. 10-11, *supra*; see also *Title IX Enforcement Manual* at 72 ("Retaliation claims * * * seek to ensure that rights created under a federal civil rights statute do not go unenforced for fear of adverse official reaction. This goal is undercut if recipients are allowed to retaliate against persons subject to their authority who publicly object to discrimination against others.") (footnote omitted).

The prohibition on retaliation is likewise indispensable to enforcement of other fundamental antidiscrimination guarantees. That includes Title VI, which prohibits racial discrimination, see pp. 10-11, *supra*, and the Rehabilitation Act of 1973, which prohibits discrimination based on disability. See 29 U.S.C. § 791 *et seq.* People with disabilities, for example, are especially vulnerable to intimidation and other tactics. As one sponsor of the Rehabilitation Act explained:

> [People with disabilities] represent a large minority group who have suffered a great many injustices. They face what seem to many insurmountable barriers. As a minority, [they] have always known exclusion—exclusion from an adequate opportunity to develop and contribute to their fullest capacity.

119 Cong. Rec. S13919 (July 18, 1973) (daily ed.).

Absent a privately enforceable prohibition on retaliation, people with disabilities would continue to know improper exclusion—exclusion from enforcing their rights under law without fear of retaliation or punishment. Unless victims of unlawful discrimination know they will be made whole should retaliation occur, their right to be free from discrimination becomes illusory. The federal courts therefore have construed the Rehabilitation Act to proscribe retaliation and have entertained private actions alleging such misconduct. See, *e.g.*, *Weber* v. *Cranston Sch. Comm.*, 212 F.3d 41, 47-48

(1st Cir. 2000); *Hoyt* v. *St. Mary's Rehab. Ctr.*, 711 F.2d 864, 865 (8th Cir. 1983). This Court should do likewise here with respect to Title IX.

II. Recognizing That Title IX Proscribes Retaliation Will Not Create Undue Litigation

A. The Prohibition On Retaliation Is Essential To Title IX But Infrequently Litigated

Although Title IX's prohibition on retaliation is crucial to its purpose—and private enforcement of that prohibition is an effective deterrent—such claims do not create undue litigation. To the contrary, although retaliation claims under Title VI, Title IX, and the Rehabilitation Act of 1973 have long been recognized by the courts of appeals, claims under those provisions have proved entirely manageable. Thousands of educational programs and institutions receive federal funds each year and are therefore subject to Title IX. According to the Department of Education's records, however, it has received an average of only 85 Title IX retaliation complaints per year during the last 10 years. See App., *infra*, 1a.

The number of claims that result in litigation may be smaller still. For example, although Title IX has been in effect for nearly 30 years, a search of decisions available on Westlaw reveals fewer than 140 reported Title IX decisions involving retaliation claims. Because almost all of those cases include both retaliation allegations and other discrimination claims, most of them probably would have been filed *even if* the retaliation claim were not independently actionable. Consequently, the prohibition against retaliation hardly creates an undue burden for the federal courts. Nonetheless, it performs indispensable functions. It ensures that those who endure discrimination *or witness it* are able to come forward by affording them confidence that there will be no retaliatory penalty or, if retaliation occurs, that they will be made whole. And it deters those who might otherwise be

tempted to conceal discrimination by intimidating witnesses and victims.

The above-cited numbers—which amount to fewer than 5 reported decisions a year nationwide—may overstate the effect on litigation in another way. In many of those cases, the plaintiff was an *employee* with a right to proceed under Title VII, which, all seem to agree, prohibits retaliation in the employment context. In other cases, the defendant was a state actor. It is well established that, because the First Amendment prohibits state actors from punishing or retaliating based on protected expression or petitions for redress of grievances, state-action retaliation is actionable under 42 U.S.C. § 1983. *Lowery*, 117 F.3d at 246 (noting that, after a Title IX retaliation plaintiff's claims were dismissed and leave to amend was denied by the district court, the plaintiff simply filed a separate lawsuit asserting claims under Section 1983); *Peters*, 327 F.3d at 322-323 (concluding that a retaliation plaintiff under Title VI had stated a separate retaliation claim under the First Amendment). Consequently, about sixty percent of the reported cases with Title IX claims that include retaliation allegations (86 of 136), either assert retaliation under both Title IX and other sources of law (such as Section 1983, Title VII, or state law), or assert it solely under sources other than Title IX.

Close examination of the reported decisions in circuits that have expressly recognized retaliation claims under Title IX reveals a similar pattern. For example, the Fifth Circuit explicitly recognized such a right of action in 1997 in *Lowery*, 117 F.3d at 254. We have identified only six reported Title IX cases asserting retaliation claims within the Fifth Circuit since. *Brooks* v. *So. Univ.*, No. Civ. A. 99-1828, 1999 WL 627385 (E.D. La. Aug. 16, 1999); *Doe* v. *Granbury Indep. Sch. Dist.*, 19 F. Supp. 2d 667 (N.D. Tex. 1998); *Flot* v. *Orleans Parish Sch. Bd.*, No. Civ. A. 96-3661, 1998 WL 915864 (E.D. La. Dec. 29, 1998); *Beasley* v. *St. Tammany Parish Sch. Bd.*, No. Civ. A. 96-2333, 1997 WL 382056

(E.D. La. July 9, 1997); *Doe* v. *Eason*, No. Civ. A. 98-2454, 1999 WL 765645 (N.D. Tex. Sept. 23, 1999); *Goins* v. *Hitchcock Indep. Sch. Dist.*, 191 F. Supp. 2d 860 (S.D. Tex. 2002), aff'd, 2003 WL 1922939 (5th Cir. 2003) (unpublished). Only three of those (*Brooks*, *Granbury*, and *Flot*) indicate that the retaliation claim was asserted under Title IX, and two of those three (*Granbury* and *Flot*) asserted retaliation under both Title IX and another source of law (Title VII and/or Section 1983).

The First Circuit embraced the availability of Title IX retaliation claims in *Frazier* v. *Fairhaven School Committee*, 276 F.3d 52 (1st Cir. 2002). Nonetheless, we have found only one reported post-*Frazier* Title IX case with a retaliation claim; the retaliation claim, moreover, may have been asserted solely under Title VII. See *Laksham* v. *Univ. of Maine Sys.*, No. CV-03-52-BW, 2004 WL 1770706, at *17 (D. Me. 2004). Nor have trial courts in the Tenth Circuit, which recognized that Title IX's private right of action extends to retaliation in *Willner* v. *Budig*, 848 F.2d 1032 (10th Cir. 1988), cert. denied, 488 U.S. 1031 (1989), been overwhelmed with such suits. Although that decision is 16 years old, we have identified only four reported post-*Willner* decisions in the Tenth Circuit that explicitly premise retaliation claims on Title IX alone. *Morse* v. *Regents of the Univ. of Colo.*, 154 F. 3d 1124 (10th Cir. 1998); *Clay* v. *Bd. of Trustees of Neosho County Cmty. Coll.*, No. Civ. A. 94-2282, 1996 WL 370176 (D. Kan. June 19, 1996); *C.R.K.* v. *U.S.D.*, 176 F. Supp. 2d 1145 (D. Kan. 2001); *Cubie* v. *Bryan Career Coll.*, 244 F. Supp. 2d 1191 (D. Kan. 2003).

B. Invalidating The Agencies' Longstanding Construction Might Increase Litigation

Invalidating the agencies' longstanding prohibition on retaliation could actually increase the complexity and volume of litigation in several ways.

First, it may require federal courts to address otherwise potentially unnecessary but often difficult state-action questions. In many cases where state action is clearly absent, foreclosing the right to sue for retaliation under Title IX might leave victims with no remedy at all. But in many cases where the state action issue is closer, refusing to recognize a cause of action under Title IX will force federal courts to confront the same claims under Section 1983, see p. 19, *supra*, and therefore require them to resolve difficult state-action questions that might otherwise be avoided. See *Brentwood Academy* v. *Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 295-296 (2001) (explaining that what "is fairly attributable [to the State] is a matter of normative judgment, and the criteria lack rigid simplicity"; that "no one fact can function as a necessary condition across the board for finding state action"; and that no "set of circumstances [is] absolutely sufficient"). Indeed, failure to recognize a cause of action under Title IX here might place increased and undesirable pressure on the state-action doctrine.

Second, where the retaliation constitutes state action, invalidating the agency's construction of Title IX could increase the likelihood of litigation. Title IX has been implemented through regulations that include voluntary mediation and reconciliation provisions that can help keep cases out of court. For example, the Department of Education's regulations under Titles VI and IX require the Department to make efforts "to persuade the recipient" to come into compliance and "to take such corrective action as may be appropriate." 34 C.F.R. § 100.8(d). To that end, the Department's case resolution manual calls for it to facilitate voluntary "early complaint resolution" by providing impartial conciliation, neutral advice on the applicable legal standards, and assistance in drafting voluntary agreements for the parties. Dep't of Education, *Office Of Civil Rights Case Resolution And Investigation Manual* §§ 201-203, 605(a).

If the victims of retaliation cannot assert that claim under Title IX (along with or instead of a claim under Section 1983, for example), it is doubtful that they will often invoke the voluntary alternative dispute resolution mechanisms available under Title IX. To the contrary, the natural course would be to proceed straight to court under Section 1983. In contrast, so long as a Title IX retaliation claim is available, the option of alternative dispute resolution before the agency responsible for enforcing Title IX's guarantees will continue to be an available and potentially attractive course.

Finally, sustaining the Eleventh Circuit's decision would eliminate the deterrence otherwise provided by the possibility of private lawsuits—deterrence that gives funding recipients a strong incentive to follow agency guidance and to institute procedures that keep retaliation (and thus retaliation claims) in check. For example, Title IX regulations mandate that recipients of federal financial assistance designate a Title IX coordinator, adopt and disseminate a nondiscrimination policy, and put in place grievance procedures to address complaints of discrimination on the basis of sex in educational programs and activities. 34 C.F.R. § 106.8. And the Department of Education's Sexual Harassment Guidelines explain that, when a complaint is made, a "school should take steps to prevent any further harassment and to prevent any retaliation against the student who made the complaint (or was the subject of harassment), against the person who filed a complaint on behalf of a student, or against those who provided information as witnesses." 65 Fed. Reg. at 66,104-66,105. "In addition, because retaliation is prohibited by Title IX, schools may want to include a provision in their procedures prohibiting retaliation against any individual who files a complaint or participates in a harassment inquiry." *Id.* at 66,105-66,106.

Institutions that follow such guidance can minimize the occurrence of retaliation and the possibility of retaliation claims. Eliminating the private right of action for retaliation, however, would reduce the incentive for funding recipients to

observe those guidelines and to institute other procedures to ensure that those who identify or witness prohibited discrimination do not fear speaking the truth. Moreover, because compliance with guidelines and procedures cannot always be guaranteed, the promise of redress for any retaliation that does occur is indispensable to ensuring that those who observe discriminatory practices are not silenced by fear of irremediable retribution.

III. The Court Should Not Immunize Funding Recipients That Purport To Retaliate Universally

Consistent with Department of Justice and Department of Education regulations, manuals, and guidance, the United States rightly has urged this Court to construe Title IX to bar retaliation against those who object to conduct thought to violate Title IX. The United States' *amicus* brief at the petition stage, however, went one step further. "Because Title IX only prohibits actions taken 'on the basis of sex,'" the brief urged (at 6), "a recipient that indiscriminately retaliates against all complainers as a class would not violate the statute." A violation of Title IX occurs, the government continued, only where the funding recipient "purposefully retaliates against a complainant *because the complaint is about* intentional sex discrimination." *Ibid.* (emphasis added).

This Court need not address the hypothetical across-the-board retaliator. It is not within the question presented, which concerns whether a cause of action for retaliation exists at all, not the scope of retaliatory activities that give rise to such a cause of action. The issue was not addressed below. And respondent never has sought to defend on the ground that it retaliates against everyone who complains without regard to subject matter. This Court ordinarily will not address issues that neither fall within the question presented nor were addressed by the court of appeals below. *Yee* v. *City of Escondido*, 503 U.S. 519, 533-534 (1992); *DeShaney* v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195

& n.2 (1989). There is good reason for the Court to follow that course here. While numerous courts have addressed retaliation claims, none to our knowledge has addressed whether across-the-board retaliation would violate Title IX. This Court traditionally functions as the court of final review, not first look. See, *e.g.*, *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 110 (2001).

In any event, as discussed below, the government's across-the-board retaliator hypothetical is unsupported by text, logic, or experience. It contradicts the government's own position as set forth in its guidelines and manuals. It threatens the government's law enforcement interests. And it is inconsistent with the interests of sensible judicial administration.

A. Text, Logic, And Experience Demonstrate That Retaliation For Complaints About Sex Discrimination Is Discrimination On The Basis Of Sex

Notwithstanding the inherent flaws in the United States' effort to posit a hypothetical universal retaliator, the point the government seeks to make—that retaliation for complaining about sex-discrimination is itself discrimination "on the basis of sex"—is well taken. Retaliation is in every sense "on the basis of sex" when it is prompted by a complaint or testimony regarding sex discrimination. History and experience make clear that retaliation to silence and intimidate those who oppose discrimination is an integral component of discrimination itself, inseparable from it and essential to its perpetuation. See pp. 11-12, *supra*. Likewise, the ability to enforce the right against discrimination without retaliation is inseparable from and essential to the right to be free from discrimination. See pp. 10-11, *supra*.

Positing the hypothetical of the across-the-board retaliator, however, obscures the critical fact that there is simply no credible circumstance in which retaliation against individuals for having raised concerns about sex discrimination would

not constitute prohibited discrimination on the basis of sex. The United States does not suggest that funding recipients would be immune for retaliation simply because, in addition to retaliating against those who raise concerns about sex discrimination, they retaliate against a few additional categories of complainants. For example, a practice of silencing, intimidating, or retaliating against those who raise sex-discrimination claims does not cease to be discrimination "on the basis of sex" simply because the perpetrator also disfavors those who raise race-discrimination claims. Discrimination does not cease to be discrimination just because the recipient retaliates against two groups rather than one.

For similar reasons, under the government's theory, a funding recipient that disfavors a large category of complainants, together with those who complain about sex discrimination, also engages in prohibited discrimination. So long as the funding recipient excludes *any* category of complainant from retaliation, the decision to accord less favorable treatment to sex discrimination complainants is still discrimination "on the basis of sex."

Consequently, under the government's theory, retaliation in response to a complaint about sex-discrimination would not constitute discrimination "on the basis of sex" only under one theoretical circumstance: where the funding recipient adheres to a policy of *equal* retaliation against *all* who complain about *any* subject, whether it be race discrimination, gender discrimination, or the quality of cafeteria food. The suggestion that an institution would have (or claim to have) such a policy is both implausible and distracting.

Respondent certainly does not purport to have a policy of universal retaliation. And despite decades of cases addressing retaliation claims in myriad contexts, we have found no case in which a defendant has ever claimed to have such a policy. The reported decisions of the federal courts are simply bereft of instances in which a funding recipient admits

having retaliated because a complaint was filed, but defends on the ground that it was motivated by the mere fact of the complaint rather than its subject matter.[4]

B. Any Effort To Accommodate The Imaginary Universal Retaliator Would Be Administratively Unsound

Given the absence of cases raising the hypothetical, there is no reason for this Court to attempt to articulate a legal standard of retaliation to accommodate the imaginary across-the-board retaliator. To the contrary, any effort to do so would turn this Court's established standards and the lower court decisions applying those standards into an unworkable morass.

It may be possible in the abstract to draw a metaphysical distinction between retaliation that is motivated by the fact that a complaint was registered, and retaliation motivated by the fact that the registered complaint concerned sex discrimination. Implementing any such distinction in practice, however, would prove impracticable. It is difficult to imagine what sort of evidence a funding recipient might produce to prove that its motivation for retaliation was the complaint rather than its subject matter; it is harder still to imagine the proof the complainant could use to rebut that assertion; and it is nearly impossible to articulate a sensible way of instructing the factfinder how to resolve the issue of motivation.

The difficulty of reconciling the United States' posited hypothetical with an administrable standard becomes more acute in light of the well-established system of *prima facie* proof and shifting burdens under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) (developing the framework

[4] Even if a funding recipient claimed to have a policy of across-the-board retaliation, the motivation for such a policy would nonetheless be an issue of fact. It seems plausible, if not likely, that a facially neutral policy of retaliating against all complainants would be motivated by (but seek to mask) hostility toward certain categories of complaints.

under § 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S. C. § 2000e-2(a)(1)).[5] Under *McDonnell Douglas*, the plaintiff first must make a *prima facie* showing of discrimination. 411 U.S. at 802; *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 251, 252-253 (1981). At that point, the defendant has the burden of coming forward with a legitimate, non-discriminatory reason for its actions. *McDonnell Douglas*, 411 U.S. at 802; *Burdine*, 450 U.S. at 254; *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 509 (1993). If the defendant meets that burden of production, the plaintiff must show by a preponderance of evidence that the putative reason offered by the defendant was a pretext for discrimination. *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000); *Burdine*, 450 U.S. at 253.

In general, a plaintiff seeking to establish a *prima facie* case where retaliation is alleged must produce some evidence to support a causal link between her complaint or participation in discrimination proceedings and the adverse action. *McDonnell Douglas*, 411 U.S. at 802; *Reeves*, 530 U.S. at 142; see, *e.g.*, *Raggs* v. *Mississippi Power & Light Co.*, 278 F.3d 463, 471 (5th Cir. 2002). By design, the burden "is not onerous." *Burdine*, 450 U.S. at 253. But if the individual claiming retaliation is saddled with the additional burden of showing that the *subject* of the complaint motivated the retaliation, the burden likely would be insurmountable. Rarely would evidence available to the plaintiff differentiate between whether the funding recipient was motivated by the

[5] Federal courts routinely have used the *McDonnell Douglas* burden-shifting framework not only under Title VII but also under other anti-discrimination statutes, including Title IX. See, *e.g.*, *Yusuf* v. *Vassar College*, 35 F.3d 709 (2d Cir. 1994); *Preston* v. *Commonwealth of Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203 (4th Cir. 1994); *Roberts* v. *Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir.), cert. denied, 510 U.S. 1004 (1993); *Lipsett* v. *University of Puerto Rico*, 864 F.2d 881, 897 (1st Cir. 1988); *O'Connor* v. *Peru State Coll.*, 781 F.2d 632 (8th Cir. 1986).

complaint or by its subject matter. There is no reason for the Court to encumber the victims of retaliation with that potentially insuperable burden.

C. The Government's Hypothetical Exclusion For Across-The-Board Retaliation Is Contrary To Its Own Guidance And Law Enforcement Interests

The government's proposed exclusion for the hypothetical universal retaliator is also contrary to its own written guidance. The Department of Education's Sexual Harassment Guidelines, for example, prohibit retaliation for filing complaints across the board, without regard to how the funding recipient treats other complainants. According to the Guidelines, funding recipients "should take steps to * * * prevent *any* retaliation against the student who made the complaint (or was the subject of harassment), against the person who filed a complaint on behalf of a student, or against those who provided information as witnesses," and should advise complaining students "that Title IX prohibits retaliation." 65 Fed. Reg. at 66,104-66,105 (emphasis added). The Guidelines nowhere suggest that Title IX permits—or that complainants should be told that Title IX permits—retaliation for the filing of a complaint so long as the retaliation is motivated by the *complaint* but not its *subject*.

Likewise, the Department of Justice's *Title IX Manual* makes no exception for retaliation based on the filing of a complaint if the complaint itself, rather than its subject, motivates the retaliatory response. Instead, the Manual states that a "recipient's retaliation against a person who has filed a complaint or who assists enforcement agencies in discharging their investigative duties violates Title IX." *Title IX Manual* at 70. That bright-line rule makes good sense from a law enforcement perspective. Because retaliation intimidates victims and witnesses alike—it prevents them from offering the evidence and information necessary to effective law

enforcement—the prohibition on retaliation is necessary to protect "the integrity and effectiveness of the enforcement process itself." *Id.* at 71. Retaliation poses no lesser threat to the efficacy of law enforcement when it targets those who raise concerns about sex discrimination together with numerous others than when it targets only those who complain of sex discrimination.

Perhaps for that reason, the United States (notwithstanding its reliance on the hypothetical equal-opportunity retaliator) nowhere suggests that the Court should adopt a standard of liability to accommodate across-the-board retaliation. Nor is any such exception statutorily mandated. Administrative agencies and courts must, by necessity, use rules and standards that generalize. No principle of statutory construction requires them to accommodate a hypothetical case that is, to put it mildly, unlikely to arise. See *Barnhart* v. *Thomas*, 124 S. Ct. 376, 382 (2003). That is particularly true where, as here, the hypothetical scenario has never arisen; its accommodation would throw a jurisprudential monkey-wrench into the otherwise well-established machinery used to adjudicate discrimination claims; might invite funding recipients to obfuscate discriminatory conduct; and would impede and potentially prevent enforcement of the statutory right.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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OFFICE FOR CIVIL RIGHTS
SOUTHERN DIVISION

DISTRICT OF COLUMBIA OFFICE
District of Columbia, Virginia, North Carolina, South Carolina

July 1, 2004

Ms. Nichole Birch
O'Melveny and Myers, LLP
1625 Eye Street, NW
Room 9C
Washington, DC 20006

Dear Ms. Birch:

I am writing in response to your June 29, 2004 Freedom of Information Act (FOIA) request for all statistical data pertaining to the number of complaints nationally alleging retaliation under Title IX, Title VI, and Section 504 for the past ten years. FOIA only requires the production of existing documents; it does not require a Federal agency to compile a document or other information. As the information you requested is not already contained in an existing document, we are not required to provide it under FOIA. However, I have decided to provide you with the information anyway.

The following represents the number of complaints received between June 1, 1994 and June 29, 2004 that include the allegation of retaliation:

Number of Complaints Alleging Retaliation Received between June 1, 1994 and June 29, 2004

Jurisdiction	*Total Received*
Title IX	**842**
Title VI	**1,387**
Section 504/Title II	**2,458**

The numbers above reflect data in OCR's Case Management System database in which "retaliation" is reported as a jurisdictional basis and/or issue. These complaints may

include other issues, in addition to retaliation; there is no ready way to isolate complaints alleging "only" retaliation.

I hope this information meets your needs. If we can be of further assistance, please contact me at (202) 208-2545.

Sincerely,

Alice B. Wender
Director
District of Columbia Office